(179) (1) No. 10-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTONIO D. WATSON; TONY TIX, INC.; GERALD W. KELLY; JUST JERRY'S, INC. t/a and d/b/a Scoreboard Restaurant & Tavern; ROBERT KENNEDY

Petitioners

v.

ABINGTON TOWNSHIP; ABINGTON TOWNSHIP POLICE DEPARTMENT; CHIEF WILLIAM J. KELLY, Individually and in his official cap city as a Police Chief, Abington Township Police Department; DETECTIVE RICHARD L. KONDON, Badge No. 1981, Individually and in his official capacity as a police officer, Abington Township Police Department; DETECTIVE JOHN PARKS, Badge No.0092, Individually and in his official capacity as a police officer, Abington Township Police Department; DETECTIVE ANTHONY AMMATURO, Badge No. 1556, Individually and in his official capacity as a police officer, Abington Township Police Department Gerald W. Kelly; Just Jerry's, Inc. t/a and d/b/a Scoreboard Restaurant and Tavern,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit abused its discretion when it denied Petitioner's Rehearing En Banc on any of the issues presented?

2. Whether the Third Circuit's failure to review relevant issues in the record constitutes a violation of Petitioner's due process rights?

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OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Pennsylvania, entered on July 31, 2008, is reported at *Watson v. Abington Township*, 478 F.3d 144. The opinion has been reprinted in the Appendix.

The order and opinion of the Third Circuit upholding the July 31, 2008 District Court opinion, entered on September 10, 2009, is reported at *Watson v. Abington Township*, 478 F.3d 144, and is reprinted in the Appendix.

The order of the Third Circuit, entered on November 12, 2008, declaring Plantiff's Petition for Rehearing en banc dismissed as moot, filed on October 12, 2009, is reprinted in the Appendix. The order of the Third Circuit denying, Plaintiff's Motion to Recall the Mandate, and to file the Petition for Rehearing out of time, entered on August 5, 2010, is reprinted in the Appendix A.

JURISDICTION

On October 30, 2001, Plaintiff brought suit in the United States District Court for the Eastern District of Pennsylvania. A cross-appeal was brought on March 26, 2009. The Third Circuit issued an opinion granting the Respondents Motion for Summary Judgment, on July 15, 2009. Petitioner was granted extended time to file a Petition for Rehearing En Banc on August 3, 2009. On October 12, 2009, Petitioner filed an untimely Petitioner for Rehearing En Banc. The Motion was never received

by the Third Circuit and the court issued a Mandate based on the untimely filing. Petitioner filed a Motion to Recall the Mandate, on July 19, 2010. The Third Circuit issued an order denying the Motion on August 5, 2010.

This Court has jurisdiction pursuant to 28 U.S.C.A. § 46(c), which states that "The Supreme Court, in the exercise of its general power to supersive administration of justice in federal courts, had responsibility of defining fundamental requirements to be observed by Court of Appeals with respect to power vested in it regarding hearings and rehearings en banc, and to insure their observance by the respective courts." This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Rule 13(3) also provides for a review of orders. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998) ("[T]he courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion."). As quoted in *Jackson v. Carroll*, 178 Fed.Appx. 178, 179 (3rd Cir. 2006).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

Fourteenth Amendment of the United States Constitution

The panel refused to read the motion to recall the mandate in violation of the Due Process Clause of the Fourteenth Amendment, which requires recalling the mandate, vacation, and other appropriate relief. 28 U.S.C. 455(a).

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

Petitioner retired from the Abington Township police department as a police patrol lieutenant in 1993. (Kelly Dep., 5/29/03, App. Volume 2, p. 7, 11). During the 28 years he was on the force he witnessed countless instances of racial epithets and discriminatory practices supported, promoted and facilitated by the Abington Township police department. (Kelly Dep., 12/22/03, App. Volume 2, p. 205). Petitioner had a clean record while on the force and did not participate in any of the department's racist practices. (Kelly Dep., 5/29/03, App. Volume 2, p. 12).

Petitioner retired from the force, in 1993, and purchased the Scoreboard Restaurant in Abington Township. (Kelly Dep., 5/29/03, App. Volume 2, p. 58). Petitioner initially had no problems. *Id.* After Petitioner leased the property to Antonio Watson, an African-American, the property was raided on several occasions. (Kelly Dep., 12/22/03, Volume 2, App. p. 124). Petitioner had several conversations with members of the Abington Township police department, where they expressed their distaste for an African-American owning a business in the township. (Kelly Dep., 12/22/03, App. Volume 2, p. 126).

The police began aggressively harassing Petitioner, Watson and his customers on or around 1999. During raids, the police would often make the customers lie on the ground while they harassed the manager on duty. (Chapman Aff., No. 11,App. Volume 2). It became difficult

for Watson to conduct his business as officers began randomly harassing and searching customers as they left the restaurant. (Kelly Dep., 5/29/03, App. Volume 2, p. 38). Furthermore, they set up consistent DUI checkpoints, raids and random stops to demonstrate their presence. (Kelly Dep., 5/29/03, App. Volume 2, p. 63). As a result of the conduct of the Abington Township police, the above mentioned action was brought to the United States District Court for the Eastern District of Pennsylvania.

B. The District Court Proceedings

On October 30, 2001, the Petitioner, along with original Plaintiffs Antonio D. Watson, Tony Tix, Inc. and Robert Kennedy, filed this action against the Respondents. On December 21, 2001, Respondents filed a motion to dismiss the complaint pursuant to Rule 12(b)(6). On January 24, 2002, Petitioner filed a Response to Defendant's Motion to Dismiss. On February 20, 2002, Respondents filed a Supplemental Memorandum in support of their motion to dismiss. On August 15, 2002, the District Court entered an Order granting in part and denying in part, the motion to dismiss. On August 26, 2002, Petitioner filed a Motion for Reconsideration of the District Court's order. On September 6, 2002, the Respondents filed a Reply to Petitioner's Motion for Reconsideration. The District Court denied the Petitioner's Motion for Reconsideration, on March 31, 2003.

On September 30, 2004, Respondents filed a Motion for Summary Judgment requesting that all claims by all Plaintiffs be dismissed. On January 13, 2005,

Petitioner filed an Answer to Respondents' Motion for Summary Judgment. On February 14, 2005, Respondents filed a Reply to Petitioner's Answer. On August 5, 2005, the District Court granted Respondents' Motion for Summary Judgment in total against Petitioner and against co-plaintiffs Antonio Watson and Tony Tix, Inc.

C. The Appellate Court Proceedings

On September 6, 2005, Petitioner filed a Notice of Appeal of the Summary Judgment order. Oral arguments were heard on Petitioner's appeal on September 12, 2006. On February 16, 2007, the Circuit Court vacated the District Court's dismissal of the Petitioner's Fourth Amendment claim and affirmed its grant of the summary judgment on the 14th Amendment claims. The case was then remanded to the District Court for proceedings consistent with the Circuit court opinion.

On July 16, 2007, the District Court issued a scheduling Order for additional discovery. On November 8, 2007, Respondents filed a Motion for Summary Judgment. On November 9, 2007, Petitioner filed a Motion for Summary Judgment along with a Memorandum of law. On November 19, 2007, Respondents filed a Response in Opposition to Petitioners Motion. On December 12, 2007, Petitioners filed a Response to Respondents Motion for Summary Judgment including a Memorandum of Law.

On July 31, 2008, the District Court issued a Memorandum and Order that the parties motions were

granted in part and denied in part, and that judgment was entered in favor of Respondents. An appeal was filed by Petitioners on December 30, 2008. A cross-appeal was filed by Respondents on March 26, 2009. The Third Circuit ruled in favor of Respondents on the cross-appeal and entered judgment on July 15, 2009.

On August 3, 2009, Petitioner filed an Extension of Time to File Petition for Rehearing pro se. Petitioner was granted leave to file until August 8, 2009. A mandate was entered on August 9, 2009. Counsel for Petitioner filed a Petition for Rehearing En Banc, on October 12, 2009. A Motion to Recall Mandate was filed, on Petitioner's behalf, on July 19, 2010. The Third Circuit entered an order denying the motion on August 5, 2010.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Review Should Be Granted Because the Third Circuit Should Not Have Denied the Petitioner's Request for a Rehearing En Banc Because the Proceeding Involved A Question of Exceptional Importance.

A Rehearing En Banc is not an ordinary remedy favored by the court; it is granted when en banc consideration is necessary to secure or maintain uniformity of the court's decisions or when the proceeding involves a question of exceptional importance. *Federal Rules of Appellate Procedure Rule* 35, 28 U.S.C.A. The instant case clearly involves a question of exceptional importance due to the pervasive racism demonstrated throughout the Abington

Township Police Department in dealings with the Petitioner and his business. In *U.S. v City of Philadelphia*, the United States Court of Appeals, Third Circuit, addressed many of the issues present in the instant case in determining whether that petitioner should be granted a Rehearing En Banc. *U.S. v. City of Philadelphia*, 644 F.2d 187 (C.A.Pa., 1980). In *City of Philadelphia*, the government was appealing a decision denying the U.S. Attorney General the right advance the civil rights claim of a third party alleging severe police brutality and discrimination by the Philadelphia Police Department towards African-Americans and Hispanics. The claim included allegations that the Philadelphia Police Department had repeatedly violated the rights of African-American and Hispanic persons they encountered on the streets and elsewhere by stopping automobiles and pedestrians without probably cause, conducting illegal searches and seizures, detaining persons without probable cause, subjecting persons to physical and verbal abuse (including racial slurs), and filing unwarranted criminal charges. In an effort to weed out frivoulous cases, the courts require a high degree of specificity in the pleading for any claim involving cases which may cause "public officials, policemen and citizens alike considerable expense, vexation and perhaps unfounded notoriety." *Id.* at 204. The majority in City of Philadelphia affirmed the denial of the Rehearing En Banc for the initial claim's failure to provide a nexus between the named defendants and the allegations of racial discrimination alleged; the majority characterized the claims as vague, inconsistent, and conclusory. *Id.* at 205-206. However, the dissent stated that the Court should have more strongly considered the Plaintiff's answers to the Defendant's

interrogatories in which the government detailed specific individuals, instances, and places involved in the alleged racial discrimination. The instant case differs from *City of Philadelphia* in that the initial complaint ***does*** comply with the specificity of the pleading standard desired by the Court. First, the Plaintiff names four specific defendants: Chief William J. Kelly, Detective Richard Kondon, Detective John Parks, and Detective Anthony Ammaturo. Second, the complaint also alleges specific instances of racial discrimnation perpetrated by the named defendants. Therefore, the instant case comports with the standards for Rehearing En Banc set forth in *City of Philadelphia.*

II. Review Should Be Granted Because The Third Circuit Abused Its Discretion In Denying Petitioner's Motion to Recall Mandate, In Direct Conflict With Decisions Of This Court And Other Circuit Courts.

The power to recall a mandate is an extraordinary remedy. *Hawaii Housing Authority v. Midkiff*, 463 U.S. 1323, 1324 (1983). A motion is to be granted only to prevent grave, unforeseen contingencies or to avoid injustice. *Calderon*, 523 U.S. at 550. Furthermore, the purpose of the recall remedy is to correct situations where the "circumstances warrant deviation from the hearing procedure" and equity cannot be achieved without its application. *In re Incident Aboard the D/B Ocean King on Aug. 30, 1980*, 877 F.2d 322, 325 (5th Cir. 1989).

A review of a decision to deny a motion for recall is subject to abuse of discretion. *Jackson*, 178 Fed.Appx.

at 179. To satisfy this burden, the Petitioner must show that the denial resulted in substantial prejudice. *U.S. v. Casamento*, 887 F.2d 1141, 1149-50 (2nd Cir. 1989). In particular, where misconduct has affected the integrity of the judicial process, recall is appropriate. *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 593-595 (3d Cir. 1977).

The authority of the Court of Appeals to recall its mandate is clear. The authority is not derived from statute, but its existence cannot be questioned and is essential to protect the integrity of its own processes. *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948). Protecting integrity may include reversing an error that was so fundamental that it resulted in a highly prejudicial result. *Continental Casualty Co. v. Dominick D'andrea Inc.*, 150 F.3d 245, 252 (3d Cir. 1998). This widely recognized authority exists only to reopen points of law already decided. *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940).

Furthermore, the decision to recall a mandate after the period of review has expired should be examined on a case by case basis to determine whether good cause has been shown and whether unusual circumstances existed. *American Iron and Steel Institute v. E.P.A.*, 589.

There have been many cases where default judgment has been set aside following an excusable attorney error. While the instant case involves a request to recall a mandate, and not a default judgment, the circumstances warrant a comparison due to the analogous and extraordinary facts. In Pennsylvania, is

has long been custom to grant relief from a default judgment where the failure is due to a mistake or oversight of counsel and where application is promptly made and a reasonable excuse for the default is offered. *Clearfield Cheese Co. v. United Stone and Allied Products Workers of America*, C. I. O., 106 A.2d 612, 614 (Pa.1954). Although courts have not clearly defined what constitues an excusable oversight or mistake on the part of counsel, they are clearly allowed to exercise their ability to set aside a judgment, due to counsel's oversight or mistake, in the interest of justice. *Seiscio v. Clarke*, 71 Montg. 348, 69 York 152, 4 Pa. D. & C.2d 261, 1956 WL 6369 (Pa.Com.Pl.). It is important to consider the reasoning behind the mistake which caused the prejudice to the requesting party. Oversights and mistakes, as opposed to deliberate decisions not to defend or dilatory tactics on the part of the client or counsel, have been held to reasonably justify the opening of a default judgment. Examples of reasonable mistakes include, but are not limited to, new counsel mistakenly believed a pleading had been filed, counsel's prior business commitments precluded him from reading the complaint in time, and the erroneous assertion of an insurance claims manger that there was still time to file a complaint. *Com. Dept. of Transp. v. Nemeth*, 442 A.2d 689, 691 (Pa., 1982).

In *Calderon*, this court argued that a mandate could not be recalled solely on the basis of a mishandling of an order in the judge's chambers, where the only consequence was two judges did not contribute to the wording of the opinion. 523 U.S. at 551. Emphasis was placed on the fact that petitioner failed to show a miscarriage of justice in the case warranting the

application of recall. *Id.* at 558. Specifically, the court stated the high importance of only using the remedy to reverse actual injustice and not to meddle with the judgments of the court unnecessarily. *Id.* at 559.

In the instant case, Petitioner was seeking relief from a grave injustice committed against his property, based on race. (Kelly Dep., 12/22/03, App. 3, p. 126). The offending conduct was committed by members of the police force, hiding behind the guise of the authority of the state. *Id.* The alleged conduct not only implicated the wrongful use of police authority, but it also uncovered a history of racism endemic in the Abington Township police force. *Id.* at 205. Furthermore, there were allegations of pervasive police harassment, based on race, as well as a concerted effort to control the racial composition of business ownership in the area. (Kelly Dep., 5/29/03, App. Volume 2, p. 92). Thus, the case had serious implications of civil and constitutional rights violations perpetrated by individuals employed by Abington Township, making the application of a potential remedy extraordinarily important.

In addition, Petitioner's appeal introduced evidence that the Third Circuit had completely ignored relevant portions of deposition testimony that were directly adverse to the reasoning provided by the District Court. (Pl. Pet., p. 2-6, App. Volume 2,). Specifically, there was evidence that an active chief of the Abington Township police force knowingly facilitated and oversaw unlawful police sweeps. *Id.* at 5. His culpability even went as far as being present and participating in one of the unlawful sweeps. *Id.* Had the District Court reviewed this evidence, it could not have come to the conclusion it did

in ruling on the summary judgment motion. *Id.* Consequently, the Third Circuit would not have upheld the District Court's ruling. *Id.*

In contrast to *Calderon*, the instant case presents far more than a case of a mere mishandling of an order. Petitioner had a strong case to appeal the Third Circuits decision to uphold the District Court's judgment. He was abandoned at the last moment by his trial level attorney. (Mot. Rec., at 4, App. Volume 2,). He was forced to frantically file an Extension of Time to File for Rehearing pro se. *Id.* at 5. He received an extended filing deadline of September 8, 2009. *Id.* Petitioner was able to retain Nino Tinari and Associates on August 19, 2009. *Id.* at 6. Due to an extraordinary oversight by an Associate in the office, the Petition for Rehearing En Banc was filed a month tardy and was not filed in the correct court. *Id.* at 7. Furthermore, the associate responsible for the filing is no longer employed at Nino Tinari and Associates. The extraordinary nature of the oversight and the subsequent departure of the associate from the office of Nino Tinari and Associates, prevented Mr. Tinari from discovering this oversight until the late date of June 10, 2010. *Id.* at 10. At this juncture, the case had been closed for an extended period of time and Petitioner's meritorious request for rehearing was never ruled upon. *Id.*

Comparing the instant case to those where default judgments have been set aside due to an oversight or error on the part of counsel, the current situation is very much deserving of reconsideration. Although there is a distinction between a request to set aside default judgment and a request to recall the mandate, the

denial of a request for either signifies the end of the line for most petitioners. When either request is improperly denied it results in clear prejudice to a deserving plaintiff. Under the standards set forth in *Nemeth*, both errors in the instant case – the associate's error which caused the Petition for Rehearing En Banc to be filed in the wrong court and the oversight in failing to realize the error in a timely fashion – qualify as reasonable mistake or excusable error. Neither error was the result of a deliberate decision not to defend or the result of dilatory tactics on the part of the client or counsel. In the interest of justice, as expressed in *Seisci*, the court is allowed to set aside judgment resulting from reasonable attorney error. Due to the extraordinary circumstances of the instant case, it would be reasonable to grant this Petition in order to examine the pervasive racism within the Abington Township Police Force.

Petitioner's Motion to Recall Mandate, filed on July 19, 2010, alleged these grave, unforeseen and extraordinary circumstances. The Third Circuit denied Petitioner's Motion on August 5, 2010. (Order, August 5, 2010, App. Volume 1). The order provided no explanation for the denial. *Id.* A denial of a Motion to Recall a Mandate is reviewed for abuse of discretion. *Jackson*, 178 Fed.Appx. at 179. The Third Circuit review of the motion without consideration of the allegations is grounds for a reversal of the mandate. *Calderon*, 523 U.S. at 550. Clearly, the failure to even review the extraordinary circumstances present in this case, or even discuss grounds for the dismissal of the motion, is abuse of discretion. Thus, because Petitioner has cited errors and omissions on the part of the appellate court that require a correction to avoid a manifest injustice,

the denial of Petitioner's Motion to Recall the Mandate should be vacated. *Id.*

III. Review Should Be Granted Because The Denial Of The Motion Constituted A Violation Of Petitioner's Due Process Rights.

An appellate court must apply some standard of review to every issue it considers. *Gulf Oil Corp. v. Comm. of I.R.S.*, 914 F.2d 396, 399 (3d Cir. 1990). When the alleged error was fundamental and ended in a highly prejudicial result, exceptional circumstances exist. *Continental*, 150 F.3d at 252. Accordingly, the Third Circuit should recall the mandate and grant the Petition for Rehearing.

The appellate court disregarded applying a standard of review, and failed to state the standard it did apply in its opinion. (Order, August, 5 2010, App. Volume 1). Relying on the District Court's opinion, after Petitioner specifically argued that the District Court failed to read or review relevant portions of deposition testimony was fundamental error. (Mot. Rec., at 2-6, App. Volume 2). Petitioner clearly articulated the District Court's failure to review relevant portions of the record in the motion to recall, proving the appellate court should correct the error of the district court by applying the appropriate standard. In its continued refusal to provide the review required by *Calderon*, the Third Circuit's denial of the opportunity to consider the allegations, instead of the District Court opinion, constituted an abuse of discretion and caused Petitioner substantial prejudice. *Casamento*, 887 F.2d at 1149-1150. As a result, the error violated Petitioner's due process rights to have his arguments

heard according to the appropriate standards. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820 (1986).

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider recalling the mandate and remand for reconsideration to the Third Circuit Court of Appeals for Reconsideration of Denial of the Petition for Rehearing En Banc.

Respectfully Submitted:

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 8, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 08-3712 and 08-3845

ANTONIO D. WATSON; TONY TIX, INC.;
GERALD W. KELLY; JUST JERRY'S, INC.
t/a and d/b/a Scoreboard Restaurant & Tavern;
ROBERT KENNEDY

v.

ABINGTON TOWNSHIP; ABINGTON TOWNSHIP POLICE DEPARTMENT; CHIEF WILLIAM J. KELLY, Individually and in his official capacity as a Police Chief, Abington Township Police Department; DETECTIVE RICHARD L. KONDON, Badge No. 1981, Individually and in his official capacity as a police officer, Abington Township Police Department; DETECTIVE JOHN PARKS, Badge No. 0092, Individually and in his official capacity as a police officer, Abington Township Police Department; DETECTIVE ANTHONY AMMATURO, Badge No. 1556, Individually and in his official capacity as a police officer, Abington Township Police Department

GERALD W. KELLY; JUST JERRY'S, INC.
t/a and d/b/a Scoreboard Restaurant & Tavern,
Appellants, Cross Appellees

Appendix A

(E.D. Pa. No. 2-01-cv-05501)

Present: BARRY, FISHER and GREENAWAY, *Circuit Judges*

1. Motion to Recall the Mandate and Motion to File Petition for Rehearing out of time, filed by the Appellant/Cross Appellees.

2. Response in Opposition filed by Appellees/ Cross Appellants to Motion to Recall the Mandate.

3. Response in Opposition filed by the Appellees/Cross Appellants to Motion to file the Petition for rehearing out of time.

/s/ Taleah Grimmage
Case Manager (267) 299-4251

ORDER

The foregoing Motion to Recall the Mandate and Motion to File Petition for Rehearing out of time, filed by the Appellant/Cross Appellees are denied.

By the Court,

/s/ D. Michael Fisher
Circuit Judge

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 15, 2009

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3712

ANTONIO D. WATSON; TONY TIX, INC.;
GERALD W. KELLY; JUST JERRY'S, INC.
t/a and d/b/a Scoreboard Restaurant & Tavern;
ROBERT KENNEDY

v.

ABINGTON TOWNSHIP; ABINGTON TOWNSHIP POLICE DEPARTMENT; CHIEF WILLIAM J. KELLY, Individually and in his official capacity as a Police Chief, Abington Township Police Department; DETECTIVE RICHARD L. KONDON, Badge No. 1981, Individually and in his official capacity as a police officer, Abington Township Police Department; DETECTIVE JOHN PARKS, Badge No. 0092, Individually and in his official capacity as a police officer, Abington Township Police Department; DETECTIVE ANTHONY AMMATURO, Badge No. 1556, Individually and in his official capacity as a police officer, Abington Township Police Department

Appendix B

Gerald W. Kelly; Just Jerry's, Inc.
t/a and d/b/a Scoreboard Restaurant and Tavern,

Appellants

No. 08-3845

ANTONIO D. WATSON; TONY TIX, INC.;
GERALD W. KELLY; JUST JERRY'S, INC.
t/a and d/b/a Scoreboard Restaurant & Tavern;
ROBERT KENNEDY

v.

ABINGTON TOWNSHIP; ABINGTON TOWNSHIP POLICE DEPARTMENT; CHIEF WILLIAM J. KELLY, Individually and in his official capacity as a Police Chief, Abington Township Police Department; DETECTIVE RICHARD L. KONDON, Badge No. 1981, Individually and in his official capacity as a police officer, Abington Township Police Department; DETECTIVE JOHN PARKS, Badge No. 0092, Individually and in his official capacity as a police officer, Abington Township Police Department; DETECTIVE ANTHONY AMMATURO, Badge No. 1556, Individually and in his official capacity as a police officer, Abington Township Police Department,

Appellants

Appendix B

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 2-01-cv-05501) District Judge: Hon. Petrese B. Tucker

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Submitted Pursuant to Third Circuit LAR 34.1(a) May 29, 2009

BEFORE: FISHER, CHAGARES and COWEN, *Circuit Judges*

(Filed: July 15, 2009)

OPINION

COWEN, *Circuit Judge*

We are confronted with cross-appeals filed, respectively, by Plaintiffs Gerald W. Kelly and his business Just Jerry's, Inc. ("Just Jerry's") (collectively "Plaintiffs") as well as Defendants Abington Township, the Abington Township Police Department, Police Chief William J. Kelly, and three individual police officers (collectively "Defendants"). The parties seek relief from a decision of the United States District Court for the Eastern District of Pennsylvania disposing of their respective motions for summary judgment.

Appendix B

For the following reasons, we will affirm.

I.

In 1993, Gerald Kelly[1] retired from the Abington Township Police Department as a Lieutenant, and he purchased the Scoreboard Restaurant and Tavern ("Scoreboard"). The restaurant was set up under the corporate entity Just Jerry's. In 1998, Kelly leased an adjacent storefront to Antonio Watson, an African-American.[2] Watson used the property to operate a ticket agency named Tony Tix, Inc. Filing suit under 42 U.S.C. § 1983, Plaintiffs claimed, inter alia, that Defendants violated the Fourth and Fourteenth Amendments.

This case has already been before this Court in a prior appeal. The District Court initially granted Defendants' motion to dismiss the Fourth Amendment claim pursuant to the closely regulated industry exception to the warrant requirement. After denying Plaintiffs' reconsideration motion, the District Court granted Defendants' motion for summary judgment as to the Fourteenth Amendment claim, finding that there was insufficient evidence of a municipal policy or custom of racial discrimination. On appeal, we affirmed the District Court's summary judgment ruling with respect to the Fourteenth Amendment claim but reversed its dismissal of the Fourth Amendment claim. *See Watson v. Abington Twp.*, 478 F.3d 144, 147, 150-57 (3d Cir. 2007).

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1. Plaintiff Kelly is not related to Defendant Chief Kelly.

2. Originally a Plaintiff in this case, Watson died in 2004.

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For the purposes of this current appeal, we limit our factual discussion to the remaining Fourth Amendment claim. Simply put, Plaintiffs have alleged that the Abington Township police conducted several warrantless sweeps of the Scoreboard for underage drinking in an attempt to drive Kelly out of business because of his relationship with Watson and his plans to sell the Scoreboard to Watson. Abington Township funded its program to sweep several bars and restaurants in the community with money obtained through a Pennsylvania Commission on Crime and Delinquency ("PCCD") grant. The sweeps were themselves planned by, and conducted at the direction of, Abington Township Police Department Lieutenant Peter Hasson.[3] On the other hand, Chief Kelly signed the PCCD grant application and was a member of the related community task force.

The police never obtained a warrant for the sweeps. The Scoreboard, along with several other establishments, was targeted on May 20, 1999, December 18, 1999, August 3, 2000, and November 25, 2000. A number of uniformed officers entered the establishment, with one officer securing the door while the others checked the patrons' identification. According to his deposition testimony, Chief Kelly was present at the Scoreboard during (or immediately after) one of the sweeps, responding to a call for assistance to handle and transport a large number of arrested underage drinkers. He remained outside the Scoreboard

3. Lieutenant Hasson had allegedly threatened Kelly about his relationship with Watson.

and never entered the establishment itself. In July 2001, the Scoreboard closed.

On July 31, 2008, the District Court granted in part and denied in part the parties' respective summary judgment motions as follows: (1) granted Plaintiffs' motion and denied Defendants' motion with respect to the Fourth Amendment claim against Abington Township because the sweeps, conducted without any warrant, constituted seizures of property not falling within an established exception to the warrant requirement; (2) denied Plaintiffs' motion as to all other Defendants; (3) granted Defendants' motion as it pertains to Plaintiffs' claims pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and dismissed such claims with prejudice; (4) granted Defendants' motion as to the individual Defendants on qualified immunity grounds; and (5) denied Defendants' motion as to all other claims. Simply put, the District Court reached this rather complex result based on its underlying determination that, while "Plaintiff has asserted a valid Fourth Amendment claim, . . . the Defendants cannot be held liable for the violation." *Watson v. Abington Twp.*, No. 01-5501, 2008 WL 2954600, at *8 (E.D. Pa. July 31, 2008).

Plaintiffs filed a timely notice of appeal. Likewise, Defendants filed a protective cross-appeal. In addition to defending the District Court's ultimate ruling in their favor, Defendants alternatively argue the District Court was incorrect to find the existence of a Fourth Amendment violation in the first place.

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II.

The District Court possessed subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and appellate jurisdiction exists under 28 U.S.C. § 1291. We exercise plenary review over the District Court's summary judgment ruling and apply the same legal standard that the District Court should apply. *See, e.g., Curley v. Klem*, 298 F.3d 271, 276 (3d Cir. 2002). We therefore may affirm an order granting summary judgment if it appears that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

Our analysis begins with the issue of Chief Kelly's involvement in the unconstitutional conduct.[4] It is well established that an individual defendant "must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of *respondeat superior*." *Rode v. Dellarciprete*, 845 F.2d

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4. Because we dispose of this appeal on other grounds, we assume arguendo that the District Court was correct to find the existence of a Fourth Amendment violation in the present circumstances and accordingly do not reach the issues raised in Defendants' cross-appeal.

The District Court further concluded that the three other individual Defendants were entitled to qualified immunity. Plaintiffs, however, do not appear to challenge this determination on appeal, limiting their entire discussion to Chief Kelly. We therefore find that any challenge to the District Court's ruling with respect to the other individual Defendants in this case has been waived. *See, e.g., United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005).

1195, 1207 (3d Cir. 1988) (citation omitted). Such involvement exists where the defendant personally directed the wrongdoing or otherwise knew about and acquiesced in the misconduct. *Id.* Plaintiffs contend that the District Court erred by failing to grant summary judgment in their favor on the grounds that Chief Kelly was personally liable for the Fourth Amendment violation because he was physically present during at least one of the unconstitutional sweeps. In addition, they claim that "he also was the top ranking commander of the Abington Township police between 1990 and 2001 and therefore directed his subordinate officers to violate Appellants' Fourth Amendment rights." (Plaintiffs' Br. at 17 (citing A48).) Plaintiffs further point to the small size of the Abington Township Police Department and the alleged close proximity between the Scoreboard and police headquarters, going so far as to claim that Chief Kelly must have known about the unconstitutional activities of his subordinates. Nevertheless, we agree with Defendants that the record clearly indicates that Chief Kelly did not personally direct the sweeps and also did not know of, and acquiesce in, the purportedly unconstitutional conduct.

It appears undisputed that, although Chief Kelly may have signed the PCCD grant application (and was evidently one of many members on the related community task force), he played no role in actually designing and then implementing the specific sweep program. Contrary to Plaintiffs' characterization, there is no evidence indicating that he "directed" the officers to violate Plaintiffs' constitutional rights. It is clear that

the program itself was designed and then run by Lieutenant Hasson, who was never named as a defendant in this litigation. In turn, Chief Kelly did not really participate in the various Scoreboard sweeps. For instance, he was not among the officers who actually executed the sweeps by entering the establishment and checking identification for underage patrons. He was called to the scene on one occasion to assist in handling several underage drinkers arrested as a result of the sweep. But he unambiguously testified at his deposition that he never entered the Scoreboard itself. In the end, Plaintiffs appear to offer nothing but speculation based on such varied considerations as rank, the size of the Abington Township Police Department, and even the proximity between police headquarters and the establishment at issue.

We must reach the same basic conclusion with respect to Plaintiffs' *Monell* claims against Abington Township (and the Abington Township Police Department). As stated in our earlier ruling, the Supreme Court held that municipal liability under § 1983 "only attaches when the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.'" *Watson*, 478 F.3d at 155 (quoting *Monell*, 436 U.S. at 694; *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990)). On appeal, Plaintiffs rely on the Supreme Court's ruling in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), to assert that a single decision or action by a policymaker could satisfy the "policy or custom" requirement for municipal liability.

It is true that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Id.* at 480. It also appears uncontested that Chief Kelly was a municipal policymaker. Nevertheless, Defendants are still entitled to summary judgment on *Monell* grounds because of the absence of a genuine issue of material fact with respect to whether Chief Kelly ever committed the requisite action necessary to hold the municipality liable for the unconstitutional conduct of its lower-ranking employees.

As already noted, Plaintiffs emphasize that Chief Kelly was the commander of the Abington Township Police Department and that he signed the PCCD application for the grant to fund the sweep program. They likewise continue to claim that he knew and acquiesced in the unconstitutional conduct of his subordinates. *See, e.g., Watson*, 478 F.3d at 156 ("In other words, custom may be established by proving knowledge of, and acquiescence to, a practice." (citation omitted)). Nevertheless, we have already found the absence of a factual dispute with respect to whether Chief Kelly had any real involvement in either the planning or execution of the sweep program. We likewise have rejected Plaintiffs' assertions with respect to Chief Kelly's alleged knowledge and acquiescence. In particular, there is no indication that Chief Kelly had any real connection with the purportedly unconstitutional search and seizure practices identified by the District Court.

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III.

For the foregoing reasons, we will affirm the judgment of the District Court.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JULY 31, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTONIO D. WATSON, ET AL.,
Plaintiffs,

CIVIL ACTION
NO. 01-5501

v.

ABINGTON TOWNSHIP, ET AL.,
Defendant.

MEMORANDUM AND ORDER

Tucker, J. **July ____, 2008**

Presently before this Court are Defendants' Motions for Summary Judgment (Docs. 73 & 74), Plaintiffs' Motion for Summary Judgment (Docs. 75 & 76), Defendants' Responses (Docs. 77 & 80) and all accompanying memoranda. For the reasons set forth below, the Court will grant in part and deny in part the parties' motions.

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PROCEDURAL BACKGROUND

The parties filed the present cross-motions following an appeal to the Court of Appeals for Third Circuit by Plaintiff Gerald Kelly and his business Just Jerry's, Inc. Plaintiffs appealed this Court's decision dismissing their claims against Abington Township, The Abington Township Police Department, Police Chief William Kelly[1] and three individual officers under 42 U.S.C. § 1983. The Circuit Court vacated this Court's dismissal of the Plaintiffs' Fourth Amendment claims and affirmed the summary judgment ruling on the Plaintiffs' Fourteenth Amendment claims. The Circuit Court held that under the Fourth Amendment, a warrantless search or seizure must be actually carried out in accordance with a regulatory scheme that provides a constitutionally adequate substitute for a warrant. The Third Circuit reviewed the regulations and found that the Abington Police Department does not fall under the special class of officials that are permitted warrantless inspection by the Pennsylvania Liquor Control Board. Viewing the complaint in light most favorable to the Plaintiffs, the Circuit Court held that the investigations were not in accordance with the Pennsylvania's regulatory scheme and this Court erred in finding the Police Department was protected by the closely regulated industry exception to the warrant requirement.

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1. Chief William Kelly is of no relation to Plaintiff Gerald Kelly and served as Abington Township's police officer during the period relevant to this case.

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FACTUAL BACKGROUND

Antonio Watson ("Watson"), an African-American male, owned Tony's Tix, Inc., ("Tony's Tix") a concert ticket-selling agency located in Abington, Pennsylvania. Watson operated Tony's Tix in a space that he leased from Plaintiff Gerald W. Kelly ("Kelly"). Kelly, a retired Abington police officer, also owned Plaintiff Just Jerry's Inc., d/b/a Scoreboard Restaurant & Tavern ("the Scoreboard"). Tony's Tix and the Scoreboard were adjacent to each other. Plaintiffs claim that the Defendants are responsible for harassment and civil rights violations based on a series of events involving the Abington Township Police.

For the purpose of resolving the present motion, the Court need only recite facts related to those incidents leading to the alleged Fourth Amendment violations. Kelly contends that the police conducted underage drinking sweeps in Abington Township in an attempt to harm their businesses. Abington Township funded the sweeps, in part, with money from a grant provided by the Commonwealth of Pennsylvania. A sweep consists of sending several uniformed police officers into a restaurant or tavern to investigate underage drinking in targeted establishments. At times, a sweep would involve the positioning of marked police vehicles outside of the targeted establishment. The police conducted the sweeps twice a year, pursuant to the terms of the Commonwealth's grant. The dates of the sweeps were May 20, 1999, December 17, 1999, August 3, 2000 and November 16, 2000. The Scoreboard was one of the

targets. On May 20, 1999, the police found nine underage drinkers at the Scoreboard; on August 3, 2000, the police found five underage drinkers. During the sweeps, the police targeted twelve different bars in Abington. In July 2001, Plaintiff Kelly closed the Scoreboard. Plaintiff Kelly alleges that the Defendants used the sweeps to harass him because of his social and professional relationship with Watson. According to Kelly, the sweeps violated his Fourth Amendment protection against warrantless searches and seizures.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at

trial, the movant's initial *Celotex* burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against opponent, even if the quality of the movant's evidence far outweighs that of its opponent." *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 255.

DISCUSSION

The Plaintiff moves for summary judgment on its Fourth Amendment claim and, in support thereof, aver that Defendants violated their Fourth Amendment rights by conducting warrantless searches and seizures ("sweeps") of the Scoreboard in violation of Section 2-211 of the Pennsylvania Liquor Code and the

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Pennsylvania Superior Court decision of *Commonwealth v. Black*, 530 A.2d 423 (Pa. Super. Ct. 1987). According to Plaintiff, Defendants sought to identify underage drinkers without the express authority of the Pennsylvania Liquor Control Board ("PLCB") or its enforcement agency, the Bureau of the Liquor Control Enforcement ("BCLE"). Plaintiff contends that this express authority is required by Sections 2-211, 4-493(21) and 5-513 of the Pennsylvania Liquor Code and *Black*. Defendant Chief Kelly was present at the first sweep of the Scoreboard, and therefore, Plaintiff contends, the Abington Township is liable pursuant to *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978).

Defendants' cross motion initially maintains that the Abington Police Department acted pursuant to a grant from the Pennsylvania Commission on Crime and Delinquency at the direction of the BCLE therefore the Officers of Abington Township Police Department were authorized to conduct sweeps at the Scoreboard. However, Defendant has now abandoned its claim that it acted under the direction of the BLCE and instead claims that it acted pursuant to the Philadelphia Crimes Code.

A. Expectation of Privacy

In remanding this case, the Circuit Court explained that this Court erred in finding that Plaintiffs had not made any allegation upon which relief could be granted. Specifically, the Circuit Court deemed erroneous this

Court's reasoning that no warrant was necessary for a lawful search since Scoreboard was engaged in the sale of liquor, which is a closely regulated industry. Relying on *Black*, the Circuit Court ended its analysis by finding that the Plaintiffs had stated a legally sufficient claim regarding the illegality of a regulatory search of the Scoreboard.

Defendants now turn the Court's attention to the initial inquiry in *Black*. Before reaching the issue of the regulatory search the Superior Court stated, "[w]e must first consider whether appellant had a legitimate expectation of privacy in the place which was invaded." *Id.* (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Defendants seek summary judgment on Plaintiffs' claim and contend that Plaintiffs' business was, at all relevant times, a business that was open to the public, and hence open to the police; therefore Plaintiffs had no legitimate expectation of privacy.

Plaintiffs concede that the business was open to the public. However, according to Plaintiffs, a Fourth Amendment reasonable expectation of privacy analysis does not apply because the officers' conduct constituted a seizure.

"The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, provides in pertinent part that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *Soldal v. Cook County*, 506 U.S. 56, 61 (1992).

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"While 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property, occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id.* (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Thus, the Fourth Amendment protects property interests even where no privacy interest is implicated. *Id.* The Court must therefore determine whether Plaintiff Kelly's possessory interest in his property–his business–incurred some meaningful interference. In *Audio Odyssey, Ltd. v. Brenton First Nat'l Bank*, officers entered Plaintiffs' business premises, ordered those inside to leave, arranged for the locks to be changed, and erected "No Trespassing" signs, thereby excluding the company's principals from the property. 245 F.3d 721, 736. The Eighth Circuit Court of Appeals held that "[s]uch an exclusion from one's property, even for a rather brief period, is 'meaningful interference' as a matter of law." *Id.*

This reasoning is persuasive. During the sweeps, between eight and ten uniformed Abington police officers would enter the Scoreboard. (Dep. Peter C. Hasson pp. 23-24, 88-89.) One officer would secure the door preventing anyone from entering or leaving until the sweep was complete. (*Id.*) The other officers would walk around the bar and check the identification of the bar's patrons. (*Id.*) In light of these facts the officers' actions were certainly a meaningful interference with Plaintiffs' property rights and therefore a seizure.

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B. Reasonableness Inquiry

A finding that a seizure has occurred however does not end the Court's inquiry. "'[R]easonableness is still the ultimate standard' under the Fourth Amendment . . ." *Soldal*, 506 U.S. at 71 (quoting *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 539 (1967)).

A seizure of property that is unsupported by a warrant or other court order is presumptively unreasonable within the meaning of the Fourth Amendment. *Audio Odyssey, Ltd.*, 245 F.3d at 736. The sweeps at issue here were admittedly conducted without a warrant, and therefore, will only fulfill the Fourth Amendment reasonableness requirement if Defendants' actions fall within an established exception to the warrant requirement. Defendant seeks to qualify its conduct under the regulated industries exception. As explained by the Circuit Court, "the regulated industries exception is a narrow one, and . . . a warrantless search [or seizure] can be placed within that exception only if it is in fact made pursuant to and in enforcement of the regulatory scheme." *Watson v. Abington*, No. 05-4133 (3d. Cir. March 5, 2007).

Initially, Defendants averred that the sweeps were conducted under the auspices of the PLCB. In their filings with this Court and with the Circuit Court, Defendants stated that "any police investigations into illegal or under-aged drinking at the Score Board Restaurant & Tavern *is done at the direction of the Pennsylvania State Liquor Control Board . . . .*" (Def. Mot. Dismiss IV. A.)(emphasis added); *see also* (Answer

¶ 59 ("check was *conducted by [P]LCB*"))(emphasis added); (Def. Mot. Summ. J. ¶ 20 ("evidence of record, adduced after completing discovery, establishes that the Officers of the Abington Township Police Department were present . . . *at the direction of the Liquor Control Enforcement Unit* . . . .")) (emphasis added). Moreover, as noted by the Circuit Court, this Court acknowledged Defendants' Motion to Dismiss argument that the searches of the Scoreboard were conducted at the direction of the PLCB.

Defendants now attempt to argue that the minors on the premises were cited under the Pennsylvania Crimes Code not the Liquor Code. In abandoning its initial assertions that the sweeps were conducted at the direction of the PLCB, Defendants seek to persuade the Court that since the officers acted within their authority under state law, and not under authority granted to the PLCB under the Liquor Code, the Fourth Amendment is not implicated. Given that Defendants current assertion is completely contradictory to those it made throughout the entire litigation of this matter, Defendants' argument strikes this Court as disingenuous.

Moreover, even assuming that the sweeps were conducted pursuant to authority granted by Title 18 of the Pennsylvania Crimes Code,[2] Defendants' argument

2. Defendant cites 42 Pa. C.S. §8952 which provides:

Primary Municipal Police Jurisdiction

Any duly employed municipal officer shall have the power and authority to enforce the laws of this

(Cont'd)

fails. Defendant acknowledges the Pennsylvania Superior Court holding that, where officers are present for "traditional duties normally associated with his or her agency," and "had no responsibilities with respect

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(Cont'd)

> Commonwealth or otherwise perform the functions of that office anywhere within his primary jurisdiction as to:
>
> 1. Any offense which the officer views or otherwise has probable cause to believe was committed within his jurisdiction;
>
> 2. Any other event that occurs within his primary jurisdiction and which reasonably requires action on the part of the police in order to preserve, protect, or defend persons or property or to otherwise maintain the peace and dignity of this Commonwealth.

Defendant states that the citations issued to minors within Scoreboard were all issued for violation of 18 Pa. C.S. §6308 which provides:

> Purchase, consumption, possession, or transportation of liquor or malt or brewed beverages
>
> (a) Offense defined - a person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or knowingly and intentionally transports any liquor or malt or brewed beverages as defined in §6310.6 (relating to definitions). For the purposes of this section, it shall not be defense that the liquor or malt or brewed beverage was consumed in a jurisdiction other than the jurisdiction where the citation for underage drinking was issued . . .

to the warrantless inspection of the bar, as that duty was reserved for the LCE personnel," their actions are constitutionally permissible. *Commonwealth v. Bennett*, 827 A.2d 469 (Pa. Super. 2003).

In *Bennett*, the BLCE decided to conduct routine administrative inspections in Westmoreland County as a part of an initiative entitled Bar None Program. *Id.*

> The Bar None Program is a multi-agency operation that involved the LCE, Pennsylvania State Police, the Westmoreland County Sheriff's Department, the Adult Probation and Parole Office in the enforcement of the *Pennsylvania Liquor Code*. 47 Pa. Stat. Ann. § 1-101, et seq. The purpose of the program is to inspect the premises which operate under a liquor license to determine whether they are in compliance with the rules and regulations set forth in the Liquor Code. *See* 47 Pa. Stat. Ann. § 2-211 "Enforcement," and 47 Pa. Stat. Ann. § 5-513, "Premises and records subject to inspection."

Id.

Plaintiff in *Bennett* sought to suppress evidence resulting from what he challenged as an illegal arrest by a Sheriff's Deputy during the Bar None inspection of the bar plaintiff was patronizing. *Id.* The Pennsylvania Superior Court held that since the deputy was acting under his authority to make warrantless arrests for

breaches of peace occurring in their presence, the deputy's actions were permissible. *Id.* at 476. The Superior Court distinguished *Black* explaining that while *Black* held that the Liquor Code does not furnish the authority for an officer to conduct a warrantless search, *Black* did not prohibit warrantless arrests for breaches of peace occurring in their presence. *Id.*

The present matter can be distinguished from *Bennett* in several respects. First, the Bar None Program detailed in *Bennett* outlined a multi-agency initiative spearheaded by the BCLE with the assistance of law enforcement. Law enforcement, in *Bennett*, then proceeded to undertake its traditional role of keeping the peace and monitoring the premises for underage drinkers and persons with outstanding warrants. In the present matter, Defendants entered Plaintiffs' property without the express of authority of LCE. Defendants indeed adopted responsibilities with respect to the warrantless seizure of the bar, a duty that in *Bennett* was reserved for the LCE.

As already explained, in order for the warrantless seizure conducted by Defendants in this matter to clear the reasonableness requirement, the seizure must fall within an exception. Defendants maintain their argument that their conduct falls within the closely regulated industries exception and can be validly placed within that exception because their actions were conducted pursuant to the enforcement of a regulatory scheme. The Circuit Court held that if the PLCB carried out the searches or the searches were conducted at the

direction of the PLCB, "the searches certainly would have been valid under the closely regulated industry exception." *Watson v. Abington*, No. 05-4133 at 15 (3d Cir. March 5, 2007). However, Defendants are now asserting that they were acting "not under the authority granted to the PLCB under the Liquor Code" but "within their authority under state law" namely the Pennsylvania Crimes Code. Since the Defendant now asserts that the searches were not conducted at the direction of the PLCB there can be no assumption that the searches were valid. The Court must therefore determine whether authority under Pennsylvania Crimes Code the sweeps were "made pursuant to and in enforcement of the regulatory scheme." In conducting this inquiry, the Court must determine "whether the state actually authorized officers to search[3] the business without a warrant." *Watson v. Abington*, No. 05-4133 at 16 (3d Cir. March 5, 2007).

Defendant offers no provision of the Pennsylvania Crimes Code which authorizes the officers to search or seize Plaintiffs' property.[4] Defendants urge this Court

3. This Court's determination that Defendants' conduct constituted a seizure does not change this inquiry.

4. For instance, compare Section 2-211 of Pennsylvania's Liquor Code, which provides in relevant part:

> (a) There is created within the Pennsylvania State Police a Bureau of Liquor Enforcement which shall be responsible for enforcing this act and any regulations thereto. Officers and investigators assigned to the bureau shall have the power and their duty shall be:

(Cont'd)

to hold that since, pursuant to 42 Pa. C.S. §8952 and 18 Pa. C.S. §6308, officers are authorized to enforce underage drinking laws, it's reasonable for them to enter a business and seize it. The Court declines to accept that reasoning. No provision of the Philadelphia Crimes Code authorizes warrantless searches or seizures.

(Cont'd)

> (1) To investigate whenever there are reasonable grounds to believe liquor, alcohol, or malt or brewed beverages are being sold on premises not licensed under the provisions of this act . . . . . .
>
> . . .
>
> (3) Upon reasonable and probable cause, *to search for and to seize*, without or process, except private homes, any liquor, alcohol or malt brewed beverages unlawfully possessed, manufactured, sold, imported or transported . . . . Such liquor, alcohol, malt or brewed beverages, stills, equipment, materials, utensils, vehicles, boats, vessels, animals or aircraft so seized shall be disposed of as hereinafter provided.
>
> (4) To investigate and issue citations for any violations of this act or any laws of this Commonwealth relating to liquor, alcohol or malt or brewed beverages or any regulations of the board adopted pursuant to such laws or any regulations of the board adopted pursuant to such laws or any violation of any laws of this Commonwealth or of the Federal Government relating to the payment of taxes on liquor, alcohol or malt or brewed beverages by any licensee, his officers, servants, agents or employees.

47 Pa. Cons. State. Ann § 2-211. (emphasis added).

Defendant concedes it was not acting under the authority of the PLCB and has not offered, nor can this Court cannot identify, any regulatory scheme that would permit Defendants actions. Plaintiffs' motion is therefore granted on this issue.

C. *Heck v. Humphrey* Does Not Apply to the Facts of the Present Matter

The Court briefly turns its attention to Defendants' attempt to apply the holding of *Heck v. Humphrey*, 512 U.S. 477 (1994) to the instant case. Defendant misapplies the holding of *Heck*. The *Heck* Court addressed the plaintiff's ability to recover for damages for an allegedly unconstitutional conviction or imprisonment. *Heck v. Humphrey*, 512 U.S. 477. The Supreme Court of the United States held that in order for a § 1983 plaintiff to recover damages for harm "whose unlawfulness would render a conviction invalid, [the] plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a State Tribunal, or called into question by a Federal Court's issuance of a Writ of Habeas Corpus . . . ." *Id.*

Plaintiff was not cited for any offense nor does he seek to recover damages for a conviction or arrest. Likewise, Plaintiff does not seek to recover for damages for the conviction or arrest of any patron of the Scoreboard nor would he have standing to assert such a claim. The holding of *Heck* does not apply to this case.

D. Plaintiffs' Monell Claim[5]

Plaintiff seeks summary judgment on its claim that both Defendants Abington Township and Chief William Kelly are liable under Section 1983 for deprivation of Plaintiffs Fourth Amendment rights. Plaintiff states that Chief Kelly directed his officers to violate Plaintiffs' Fourth Amendment rights. According to Plaintiff, Abington Township is therefore responsible to Plaintiffs. Defendant retorts that Chief Kelly did not participate in the sweeps and therefore cannot be held liable under § 1983.

A municipality may be held vicariously liable for the unconstitutional actions of its agents when the agent's conduct was the result of a "municipal policy" or "well-established custom." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). A municipal policy is a "statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690. A custom is a "persistent and widespread" practice of government action that is "so permanent and well settled as to constitute a custom or usage with the force of law." *Id.* at 691. A municipality may not be held liable under § 1983 solely on the basis of the existence of an employee-employer relationship with a tortfeasor.

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5. Defendants argue that Plaintiffs' Monell claims remain dismissed pursuant to this Courts initial dismissal of Plaintiffs' Fourth Amendment claims. Plaintiff correctly asserts that in vacating this Court's dismissal of the Fourth Amendment claims, Plaintiffs' Monell claim, as it relates to the alleged Fourth Amendment violations, was also reinstated.

Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 403 (1997). Municipalities can only be held liable if action pursuant to official municipal policy caused a constitutional tort. *Monell*, 436 U.S. at 691. Further, a municipality can only be liable for a constitutional deprivation if there is a direct causal link between a policy or custom and the alleged constitutional deprivation. *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 214-215 (3d Cir. 2001) (quoting *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)).

Here, Plaintiffs implicitly attempt to assert that since Chief Kelly was present at the sweeps, as evidenced by his testimony, and directed the actions of the officers present, his actions amount to a policy that was the proximate cause of a Fourth Amendment violation. This argument bears no merit. Plaintiffs have offered no evidence to prove that the actions of the police reflect a well-established custom or municipal policy. Relying on Chief Kelly's deposition testimony, Plaintiffs assert that as the top ranking commander of the Abington Township Police, he was the decision-maker and directed his officers to violate Plaintiffs Fourth Amendment rights. Chief Kelly's testimony, however, merely establishes that he was a "decision-maker." Plaintiffs have not offered any evidence that the police department or the Township officially or even implicitly adopted warrantless searches and seizures as a well-settled practice. Because the Plaintiff cannot establish that the Defendants had a policy of warrantless searches or seizures, Defendants' Motion for Summary Judgment on Plaintiffs' *Monell*

claims is granted and Plaintiffs' motion on this issue is denied.

E. Qualified Immunity

Defendants contend that summary judgment is proper based on the doctrine of qualified immunity. An official is entitled to qualified immunity in his individual capacity under § 1983 if a reasonable official would have believed that his actions were proper under existing law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Qualified immunity should be denied only if, in light of pre-existing law, the unlawfulness of an action should have been apparent. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Thus, the qualified immunity defense provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). This Court must determine whether Defendants' conduct was "objectively reasonable" given the clearly established state of the law. *Curley v. Klem*, 298 F.3d 271, 278-79 (3d Cir. 2002).

In determining whether an official is entitled to qualified immunity, "we [must] begin by considering the threshold question of whether the alleged facts, viewed in the light most favorable to [the plaintiff], show that [the official's] conduct violated a constitutional right." *Curley*, 298 F.3d at 279. The "reasonableness inquiry is an objective one." *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). In conducting this analysis, the Court "must judge 'from the perspective of a reasonable officer

on the scene, rather than with the 20/20 vision of hindsight.'" *Id.* (quoting *Graham*, 490 U.S. at 396). Qualified immunity is not appropriate where it is found that the officer "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Wood v. Strickland*, 420 U.S. 308, 322 (1975), quoted in *Forbes v. Twp. of Lower Merion*, 313 F.3d 144, 148 (3d Cir. 2002). However, "[i]f an official could have reasonably believed that his or her actions were lawful, the official receives immunity even if in fact the actions were not lawful." *Forbes*, 313 F.3d at 148.

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court enumerated the two-part inquiry a court must make in order to determine whether a state official is entitled to qualified immunity: 1) they must determine whether the facts alleged show that the officer's conduct violated a constitutional right; and 2) if a violation could be made out on a favorable view of the parties' submissions, the Court must also ask whether the right was a clearly established right. *Id.* at 201.

Defendants' motion for summary judgment on this issue of qualified immunity will be granted. Indeed, Plaintiff has alleged a constitutional violation. However, this Court is satisfied that, at the time of their actions, Defendants reasonably believed that their conduct was lawful. This is true even though this Court has held that Defendants actions were, in fact, unlawful. *Forbes*, 313

F.3d at 148. At the time of the sweeps, the officers believed that they were operating with the sanction of the PLCB and that their actions were lawful pursuant to that sanction. Plaintiff does not offer a basis for this Court to hold that the officers knowingly violated the law. The individual officers are therefore entitled to qualified immunity.

CONCLUSION

Since Defendants acted without a warrant and constituted a meaningful inference with Plaintiffs' property rights and Defendants conduct does not fall within any exceptions to the warrant requirement, this Court will grant in part Plaintiffs' Motion for Summary Judgment.

However, the Abington Township may not be held liable for the actions of law enforcement since Plaintiff has failed to prove that the officers' conduct was the result of a municipal policy or well established custom. Further the individual Defendants are entitled to qualified immunity. Thus, Defendants' Motion for Summary Judgment is granted in part.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AUGUST 5, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
August 5, 2010

Nos. 08-3712 & 08-3845

ANTONIO D. WATSON; TONY TIX, INC.;
GERALD W. KELLY; JUST JERRY'S, INC.
t/a and d/b/a Scoreboard Restaurant & Tavern;
ROBERT KENNEDY

v.

ABINGTON TOWNSHIP; ABINGTON TOWNSHIP POLICE DEPARTMENT; CHIEF WILLIAM J. KELLY, Individually and in his official capacity as a Police Chief, Abington Township Police Department; DETECTIVE RICHARD L. KONDON, Badge No. 1981, Individually and in his official capacity as a police officer, Abington Township Police Department; DETECTIVE JOHN PARKS, Badge No. 0092, Individually and in his official capacity as a police officer, Abington Township Police Department; DETECTIVE ANTHONY AMMATURO, Badge No. 1556, Individually and in his official capacity as a police officer, Abington Township Police Department

GERALD W. KELLY; JUST JERRY'S, INC.
t/a and d/b/a Scoreboard Restaurant & Tavern,
Appellants, Cross Appellees

Appendix D

(E.D. Pa. No. 2-01-cv-05501)

Present: FISHER, CHAGARES, and COWEN,
Circuit Judges.

Motion filed by Appellants/Cross Appellees to reconsider order of 07/08/10 denying Motion to Recall the Mandate, and to file the Petition for Rehearing out of time.

/s/ Taleah Grimmage
Case Manager (267)299-4251

ORDER

The foregoing motion is denied.

By the Court,

/s/ D. Michael Fisher
Circuit Judge

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No. 10-685 (2)

Supreme Court, U.S.
FILED
JUN 26 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GERALD W. KELLY and JUST JERRY'S, INC.
t/a and d/b/a SCOREBOARD RESTAURANT & TAVERN

Petitioners,

v.

ABINGTON TOWNSHIP, ABINGTON TOWNSHIP POLICE DEPARTMENT and WILLIAM J. KELLY, CHIEF

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW

Properly analyzed, the question presented by the petitioner in this case encompasses 3 issues:

1) Whether the Court of Appeals properly denied the motion for rehearing en banc when the plaintiff failed to establish the showing necessary to recall the mandate nor established an issue requiring rehearing.

2) Whether denial of the motion to recall the mandate was proper when the plaintiff failed to establish extraordinary circumstances or a miscarriage of justice.

3) Whether the Court of Appeals' denial of the motions for re-hearing, to recall the mandate, or for reconsideration constituted a denial of due process.

STATEMENT OF THE PARTIES TO THE PROCEEDING

The parties to the appeal from which this Petition arises are limited to plaintiff Gerald W. Kelly and his company, Just Jerry's Inc., t/a and d/b/a Scoreboard Restaurant & Tavern, and defendants Abington Township, Abington Township Police Department, and Chief William Kelly.

The other plaintiffs in the caption were no longer in the case when the district court issued its order in July 2008. Further, the plaintiff's appeal to the Court of Appeals for the Third Circuit addressed only the allegations against the municipality and Chief Kelly, with the claims against all the other defendants being waived. (App. 9a)

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CONSTITUTIONAL PROVISIONS

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I. FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

This petition stems from the second appeal in this case which was decided by the Court of Appeals for the Third Court. *See, generally, Watson v. Abington Twp.*, 478 F.3d 144 (3d Cir. Pa. 2007). In the first appeal, the Court of Appeals affirmed the dismissal of all the plaintiff's claims, save for those based on the Fourth Amendment. *Id.* The Court held that the dismissal of those claims on a 12(b)(6) motion was premature and required discovery. *Id.* The case was returned to the District Court. After discovery was conducted, the defendants moved for summary judgment, which was granted in part by the Honorable Patrice B. Tucker, U.S.D.J. (A4) The plaintiffs appealed part of the ruling, granting summary judgment to Chief William J. Kelly and the municipality, but did not challenge the grant of summary judgment to the other officers. (A1)

The appellant, plaintiff Gerald Kelly, was the owner of the Scoreboard Restaurant & Tavern and is a former police officer who retired from the Abington Police Department in 1993. (See, complaint, at 4,7) Upon his retirement, Mr. Kelly became the owner of the Scoreboard, located at 1114-16 Old York Road in Abington, Pennsylvania. (*Id.*) Chief Kelly was the Abington Township Police Chief for all the relevant events in this case. (A48)

In part relevant to this appeal, the plaintiff's complaint alleged that the Abington Police Department performed "sweeps" of the Scoreboard, in which uniformed officers would enter the establishment to deter underage drinkers. (See, Complaint, at 11-17) The sweeps commenced in 1999, and were funded pursuant to grants provided

by the Commonwealth of Pennsylvania. (A56, et seq.) Abington Township obtained a renewable grant from the Juvenile Justice Commission, which included $7,500 for law enforcement officials to conduct twice-yearly sweeps of problem bars in the municipality. (*Id.*)

The sweeps themselves were conducted at the direction and under the supervision of Lt. Peter Hasson. (See, Deposition of Lt. Hasson, attached as Exhibit to 9/30/2004 Motion for Summary Judgment.) He chose the times and locations where the sweeps occurred in a random fashion so there could be no basis for alleging that any one bar was swept more frequently than any other. (*Id.*)

Lt. Hasson testified that the interaction he had with Chief Kelly regarding the sweeps essentially consisted of him informing him, in a very general fashion, the day after each of the sweeps. (*Id.*) This was not done on Chief Kelly's direction, but merely because Lt. Hasson thought it proper to keep Chief Kelly informed. (*Id.*)

The dates of the sweeps of the Scoreboard were: May 20, 1999, December 17, 1999, August 3, 2000 and November 16, 2000. The sweeps all occurred in the evening, as were the checks at every other bar which were conducted in Abington Township. (*Id.*) Mr. Kelly was never there for any of the age checks. On May 20, 1999, nine underage drinkers were found at The Scoreboard. None were found on December 17, 1999. On August 3, 2000, five underage drinkers were found at The Scoreboard. The final sweep was done on November 16, 2000. (*Id.*)

The testimony in this case also established that Chief Kelly was only present during one sweep, but he never entered the premises. (A54-55) He responded when assistance was requested to take custody of and process the large number of underage drinkers found at the Scoreboard. (*Id.*) He remained outside the bar and never entered the establishment. (*Id.*)

During discovery, the deposition was taken of Major John Lutz, Director of the Pennsylvania State Police Bureau of Liquor Code Enforcement. Major Lutz testified that The Scoreboard Lounge was, at the time of Abington Township Police Department's sweeps, open to the public. (A42-A43). The records of the Liquor Control Board reveal that on numerous occasions, underage drinkers were cited for violation of Pennsylvania Crimes Code, Section 6308, referring to underage drinking, at the Scoreboard Lounge. (A-42).

Those same records reveal that the Liquor Control Enforcement Unit, not the Abington Township Police Department, cited the plaintiff at least four times for violation of the Liquor Code:

1. Citation #99-0176 - $1,000 fine for sales to a minor.

2. Citation #99-1371 - $1,250 fine for sales to minors and minors frequenting.

3. Citation #99-1769 – three day suspension for sale to minors.

4. Citation #00-1784 – for the establishment's fourth violation in a one year period.

(Citations, attached as Exhibit "C" to 11/8/2007 Summary Judgment Motion) In each of the four instances, plaintiff waived his rights and executed a statement of waiver, admission and authorization. (*Id.*; A42.)

Furthermore, Officer Karen Hearn, an Enforcement Officer with the Liquor Control Board, was deposed and testified that it was part of the traditional function of law enforcement to check establishments such as The Scoreboard for underage drinking. (Hearn Deposition, attached as Exhibit "D" to 11/8/2007 Summary Judgment Motion, at 8). Major Lutz testified that the decision to check for underage drinkers is one left to the municipality and its District Attorney. (A-43).

The defendants filed a motion for summary judgment, on November 8, 2007. A cross-motion was filed by the plaintiff on November 9, 2008. On July 31, 2008, Judge Tucker issued her opinion and order. (A4-A20) She first found that the plaintiffs had established a violation of the Fourth Amendment in the warrantless seizure of the plaintiff's bar. (A11-A16) However, she then found that there was no evidence that Chief Kelly took part in the sweeps, that the individual officers and Chief Kelly and were entitled to qualified immunity, that the *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) claim for municipal liability had to be dismissed because the plaintiff failed to establish any policy or custom. (A16A20)

---

1. This fourth violation was for bad checks, 47 P.S. §4-493 (26).

On August 29, 2008, the plaintiff filed a notice of appeal, appealing the decision by Judge Tucker that found in favor of Chief Kelly and Abington Township. (A1) The plaintiff did not pursue the claims against the individual officers that were dismissed. On September 10, 2008, the defendants took protective cross appeal, arguing that Judge Tucker erred in finding that the plaintiff established a violation of the Fourth Amendment. (See, Notice of Cross Appeal)

On July 15, 2009, the Court of Appeals for the Third Circuit issued its nonprecedential opinion affirming the grant of summary judgment by the District Court. (App. 3a-13a) On August 3, 2009, the plaintiff, pro se, filed a motion for an extension of time to file a petition for re-hearing, based on the retirement of his counsel. (See, Motion for Extension of Time.) An Order granting that motion was also filed on August 3, 2009, and the plaintiff was given until September 8, 2009 to file the petition for rehearing.

No petition for rehearing was filed in the time allotted, and so, on September 9, 2010, the Court of Appeals issued its mandate. (See, Letter Enclosing Judgment.) Notice of the filing of the mandate was sent to the plaintiff directly and through his previous counsel. (*Id.*)

Approximately a month later, on October 13, 2009, the plaintiff's current counsel, Nino V. Tinari, Esq., filed a Petition for Rehearing En Banc on behalf of the plaintiff, but he did so in the District Court for the Eastern District of Pennsylvania, and not in the Court of Appeals. (See, District Court docket.) An electronic confirmation of that filing in the district court was sent to the plaintiff's

attorney. (See, opposition to the motion to recall the mandate, Exhibit "E")

The matter remained filed in the district court, with no action taken, until June 11, 2010, at which time Mr. Tinari entered his appearance in the Court of Appeals. (See, Court of Appeals Docket.) Three days later, on June 14, 2010, he filed motions for re hearing en banc, for leave to proceed out of time, and a motion to recall the mandate. (*Id.*)

After responses were filed to the motion to proceed out of time and the motion to recall the mandate, the Court of Appeals issued its July 8, 2010 order denying all of the plaintiff's motions. (App. 1a-2a). The plaintiff filed a motion for reconsideration of the July 8, 2010 order, which was denied by order dated August 5, 2010. (App. 35a-36a)

The plaintiff's petition for certiorari to this Court follows.

II. ARGUMENT AGAINST ISSUING THE WRIT OF CERTIORARI

A. THE CONSIDERATIONS PREFERRED BY THIS COURT WHEN GRANTING CERTIORARI ARE NOT PRESENT HERE

Rule 10 of the Supreme Court Rules details the reasons which this Court considers compelling when determining whether to exercise its prerogative and issue a writ of certiorari.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of

> erroneous factual findings or the misapplication of a properly stated rule of law.

SUP. CT. R. 10.

None of the considerations of Rule 10 are present in the plaintiff's petition for a writ of certiorari. The plaintiff's claim is, at heart, a request for this Court to act as an error-correcting court and to review what the plaintiff sees as an erroneous denial of the motion for rehearing en banc, denial of the motion to recall the mandate and the denial of the motion for reconsideration.

None of these matters even remotely address any of the concerns for which this Court normally reserves certiorari. For that reason, and because there is no basis for the plaintiff's assertions of error, the petition for writ of certiorari should be denied.

B. THERE WAS NO ABUSE OF DISCRETION IN THE COURT OF APPEALS DENYING THE PETITION FOR REHEARING EN BANC.

Denial of the petition for Rehearing En Banc was not erroneous. Rehearing en banc is a form of discretionary review. *Western P. R. Corp. v. Western P. R. Co.*, 345 U.S. 247, 272 (U.S. 1953); *United States v. Coney*, 120 F.3d 26, 28 (3d Cir. Pa. 1997)("en banc rehearing by the courts of appeals is discretionary.") The denial of the plaintiff's petition for such review was not an abuse of discretion for two reasons: first, the mandate was issued prior to his filing the motion and he failed to establish a basis to recall the mandate. Second, there was no error in the decision in the July 15, 2009 Opinion of the Court of Appeals.

There Was No Error In Not Recalling The Mandate

First, it was not an abuse of discretion to deny the petition for rehearing en banc, because the plaintiff failed to meet the standard required for the Court of Appeals to recall the mandate.

The issuing of the mandate marks the formal end of the Court of Appeal's jurisdiction in a matter. *Johnson v. Bechtel Associates Professional Corp., D.C.*, 255 U.S. App. D.C. 198, 801 F.2d 412, 415 (D.C. Cir. 1986); see *United States v. Jerry*, 487 F.2d 600, 607 (3d Cir. 1973).

Moreover, this Court has stated that although "the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion . . . the power can be exercised ***only in extraordinary circumstances . . . [and] is one of last resort***, to be held in reserve against ***grave, unforeseen contingencies***." *Calderon v. Thompson*, 523 U.S. 538, 549-550, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (citations omitted, emphasis supplied). It should also be noted that the act of recalling the mandate, other than to avoid a miscarriage of justice, constitutes an abuse of discretion. *Id.*, 523 U.S. at 558.

In explaining that recall may be warranted for good cause, to prevent injustice, or in special circumstances, the Third Circuit Court of Appeals, citing *Greater Boston Television Corporation v. F.C.C.*, 463 F.2d 268 (D.C. Cir. 1971), identified five situations which would justify recalling the mandate:

1) where clarification of the mandate and opinion is critical;

2) where misconduct has affected the integrity of the judicial process;

3) where there is a danger of incongruent results in cases pending at the same time;

4) where it is necessary to revise an "unintended" instruction to a trial court that has produced an unjust result; and

5) where a subsequent Supreme Court decision showed that the original judgment was demonstrably wrong.

American Iron & Steel Institute v. EPA, 560 F.2d 589, 593-95 (3d Cir. 1977). None of those circumstances was present in this case. In this case, after the retirement of his previous counsel, the plaintiff pro se filed for an Extension of Time to File Petition for Rehearing, which was granted by the Court of Appeals. The order was issued on August 3, 2009 and gave the plaintiff until September 8, 2009 to file for rehearing en banc. The order was sent to both the plaintiff, himself, and the plaintiff's previous attorney.

The plaintiff's current attorney was retained on August 19, 2009. The plaintiff's Petition for Rehearing En Banc was not filed by September 8, 2009, as required by the August 3, 2009 order, so on September 9, 2009, the mandate was issued.

Over a month later, on October 13, 2009, the plaintiff's new counsel filed a Petition for Rehearing En Banc on behalf of the plaintiff, but did so in the district court. Thus, at the point the plaintiff misfiled his Petition for Rehearing, the jurisdiction of the Court of Appeals had ended approximately one month earlier.

The plaintiff's argument in connection with his argument to recall the mandate failed to explain why the motion was filed after the issuing of the mandate and in the wrong court, except to blame it on an "extraordinary oversight" by an unnamed associate.

However, the notion that this misfiling presents extraordinary circumstances or constitutes a grave condition, sufficient to recall the mandate, because the error was supposedly the work of an unnamed associate, is wholly untenable.

First, this petition was not filed in the name of this unknown associate, but was filed in Mr. Tinari's name. As such, he was responsible for seeing that it is properly filed and he was responsible for supervising any associate he might assign to work on this matter. Moreover, while the plaintiff stated in his petition that Mr. Tinari was unaware of the error in filing this matter until a telephone call from Mr. Kelly on June 10, 2010 alerted him to the problem, Mr. Tinari knew or should have known of the misfiling, as he was the attorney of record in the district court and, as such, was sent the Notice of Electronic Filing to his email address, nino@ntinarilaw.com. (See, Notice, attached as Exhibit "E" to Opposition to the Motion to Recall the Mandate) That notice clearly and unmistakably notes that the document was filed in the United States District Court

for the Eastern District of Pennsylvania, and warns that the case was closed on February 1, 2006, a clear sign that the pleading was not filed in the correct court.

As such, as the plaintiff did not establish any extraordinary circumstance or grave condition which justified the Court of Appeals in recalling the mandate, the Court of Appeals properly exercised its discretion in denying the plaintiff's motion to recall the mandate. As such, the Court had no jurisdiction to reconsider the matter en banc, so the denial of that motion, too, was proper.

There Was No Error In Affirming The District Court Order

The denial of the motion for rehearing en banc would also have been appropriate, aside from the issue of the mandate, as there was no error in the affirmance of the District Court's decision.

The plaintiff asserted on appeal that Chief Kelly should be found personally liable for the supposed violation of the plaintiff's Fourth Amendment rights, based solely on the fact that he was present during one of the raids on the plaintiff's business while it was violating the law by serving alcohol to minors.

However, Chief Kelly did not participate in the sweeps. So even if it is assumed that the sweeps constituted a violation of the Fourth Amendment, Chief Kelly cannot be held liable merely he was present. Mere presence during an alleged violation of the Fourth Amendment does not confer personal liability. The law is clear that for liability

to attach, the defendant must actually take part in the alleged violation.

"A defendant in a civil rights action must have personal involvement in the alleged wrongs" in order to be liable. *Sutton v. Rasheed*, 323 F.3d 236, 249 (3d Cir. 2003) (*citing Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988)). *See, also, Abbott v. Latshaw*, 164 F.3d 141, 147 (3d Cir. 1998)(no liability to officers present during alleged illegal seizure of property during self-help repossession, where the officers did not participate in acts constituting seizure.)

In a 42 U.S.C. § 1983 lawsuit, defendant must have had personal involvement in the alleged wrong, as liability cannot be based solely on the doctrine of agency or respondeat superior theory. *Paratt v. Taylor*, 451 U.S. 527, 537 n. 3 (1981). Thus, in order to successfully establish individual liability, plaintiff must plead, and ultimately prove, that a defendant was personally involved in the conduct, or that the defendant had actual knowledge and acquiesced in said conduct. *Rode v. Dellarcripete*, 845 F.2d 1195, 1207 (3d Cir., 1988).

In this case, Chief Kelly did not participate in the underage sweep of the plaintiff's bar; he was on the scene during one sweep to help facilitate the arrest and custody of the underage drinkers that the plaintiff was serving with alcohol. Chief Kelly specifically noted that he did not enterer the plaintiff's bar on the night of the sweep.

Q: ...In 1997 did you participate in a sweep in 1997 Scoreboard Bar and Restaurant?

A: There was one sweep that I was there.

Q: Is it 1997?

A: I don't know when it was.

Q: When is it that you were there?

A: On of the first ones I think.

Q: And is it one of those sweeps that were non pursuant to this grant that's been talked about as far as Kelly-1?

A: As I've said, to the best of my knowledge, the only time we did bar sweeps were those pursuant to the grant.

(A54-A55)

Q: ... Well, if you had participated in one of those sweeps, wouldn't your name being listed as one of the officers on one of these documents?

A: I don't know if it was one of the ones that's listed in this group that you have here or if my name is up top or whatever.

* * *

A: ...you have to understand, an individual officer is assigned to write the report and if they don't get everybody's name there or whatever then it wouldn't be there, but there was one that – I don't even remember all the circumstances. ***I never went in the***

> ***bar.*** All I did was help because there was a large number of kids that were getting arrested and I was helping with handling and transporting all these kids that were getting arrested.
>
> Q: Yourself?
>
> A: Pardon me?
>
> Q: You were doing that yourself?
>
> A: I was helping the people who were doing it, yes, because – the reason I was there was because they indicated that there is – can you send some more officers, we got all these kids we're going to be taking in...

(A55, emphasis added)

> Q: Okay. Was Jerry Kelly present?
>
> A: I'm not sure. ***I didn't go in. I never went in the bar*** and – but, I can't remember whether Jerry was there or not.

(*Id.*, emphasis added.) There was no evidence contradicting this testimony. Thus, it is clear that while Chief Kelly was on the scene on one occasion to help handle and transport the many underage drinkers which were found at the plaintiff's bar, he, himself, never went into the bar.

Thus, if, as the plaintiff suggests, the underage sweep constituted a seizure of the bar, then Chief Kelly could not

be found liable for that supposed seizure; the most that can be said about Chief Kelly's personal liability was that he was a witness to the event. He was not a participant and his mere presence and non-participation during the alleged seizure is insufficient to establish a viable claim against him.

Further, the plaintiff attempted to establish liability by asserting that Chief Kelly was the "top ranking commander of the Abington Township police between 1990 and 2001 and therefore directed his subordinate officers to violate Appellants' Fourth Amendment Rights." (Plaintiff's brief at 17). However, nothing in this record substantiates the claim that Chief Kelly "directed" the officers to do anything, let alone to violate anyone's rights. As the Court of Appeals and the district court recognized, the record clearly establishes that the raids were planned and conducted by Lt. Peter Hasson.[2]

The mere fact that Chief Kelly was the highest-ranking officer in the department is not sufficient to establish that he is individually liable for everything that any of his subordinate officers does, especially here, where there is simply no evidence whatsoever that he had any direct participation in any unlawful conduct. *See, Brown v. Grabowski*, 922 F.2d 1097, 1119-20 (3d Cir. 1990)(a supervisor's mere failure to train, supervise or discipline subordinate officers does not state a basis for a § 1983 claim against the supervisor absent proof of direct participation by the superior in some unlawful conduct.)

---

2. It must be noted that although Lt. Hasson was the officer who planned and conducted the underage sweeps that the plaintiff complains of, the plaintiff neither sued Lt. Hasson nor attempted to have him added to the litigation.

As such, the plaintiff could not establish a violation sufficient to support the § 1983 action, and dismissal pursuant to qualified immunity was proper. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) Further, the denial of the claim for municipal liability under *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) was proper because the Chief Kelly took no action from which the municipality might be held liable. (App 11a-12a)

The plaintiff cites to *U.S. v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980), in support for the notion that the petition for rehearing en banc should have been granted. However the petition for rehearing en banc was denied in City of Philadelphia. Although some of the Judges dissented, that dissent does not represent the decision of the Court and cannot establish that the denial in this case was erroneous.

Thus, there was no error in the Court denying the motion for rehearing en banc.

C. THE COURT OF APPEALS PROPERLY DENIED THE MOTION TO RECALL THE MANDATE.

As detailed in the preceding section, there was no error in the Court of Appeals denying the plaintiff's motion to recall the mandate. The plaintiff simply failed to show an extraordinary circumstances or a miscarriage of justice or give any explanation for the late filing or the filing in the wrong court, sufficient for the Court of Appeals to exercise its discretion in recalling the mandate. Those arguments are adopted here by reference.

D. THERE WAS NO ERROR IN THE COURT OF APPEALS' CONSIDERATION OF THE PLAINTIFF'S MOTIONS.

Finally, the plaintiff asserts that it was error for the Court of Appeals to deny his motion for reconsideration without allegedly applying or stating the standard it applied.[3]

The plaintiff presented nothing in his motion for reconsideration which addressed the issues germane to recalling the mandate; rather, he merely restated his allegation that the a former associate had mishandled the filing of the motion for rehearing en banc, without given any explanation why it was filed beyond the extension given by the Court of Appeals, beyond the issuance of the mandate, and in the wrong court.

As such, under the standard laid out in *Calderon*, *supra.*, the failure of the plaintiff to demonstrate extraordinary circumstances or that a miscarriage of justice would occur in the absence of recalling the mandate—neither of which was present on the face of the plaintiff's motions—mandated the denial of the plaintiff's motions. Rather than failing to apply any standard, the Court of Appeals applied the correct standard and denied the motion.

Further, the plaintiff provides no authority that the Court of Appeals' denial of a motion without accompanying

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3. The plaintiff's argument in this section is muddled, as it refers to the "motion to recall," but clearly cites the order of August 5, 2010, which was the denial of the plaintiff's motion for reconsideration of the denial of the motion to recall the mandate.

opinion constituted a violation of due process, as the issuance of such an order without separate opinion is not, per se, unconstitutional. *See, e.g., Papageorgiou v. Gonzales*, 413 F.3d 356, 359 (3d Cir. 2005) ("We agree with our sister courts of appeals . . . that the streamlining regulations [which allow for BIA affirmances of IJ decisions without separate opinions] do not violate the Due Process Clause of the Constitution.") As such, the claim that due process was violated here is simply untenable.

For the reasons set out in the Courts' opinions, it is clear that there was no error in finding n the defendants' favor. Further, there was no error in the denial of the plaintiffs' motions for rehearing en banc, to recall the mandate and for reconsideration. Consequently, the petition for certiorari should be denied.

III. CONCLUSION

For all of the foregoing reasons, this Court is respectfully requested to deny the plaintiff's Petition for Writ of Certiorari.

Respectfully Submitted,

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